

STATE OF MICHIGAN  
IN THE SUPREME COURT

OK  
WILLIAM C. DESSART, and SHIELA A.  
DESSART,

Plaintiffs/Appellants,

Court of Appeals No: 233844

v

Lower Court No: 98-14355-NI

LYNN MARIE BURAK, and BRYAN R.  
BURAK,

Defendants/Appellees.

*Belton*  
*S. Davis*

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**Application For Leave To Appeal**

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122238

AIR

9/24

**FILED**

AUG 30 2002

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## Statement Identifying The Judgment/Order Appealed From And Indicating Relief Sought

1. Plaintiffs/appellants, William C. Dessart and Shiela A. Dessart, pursuant to *MCR 7.302*, file the present application for leave to appeal from the opinion and order of the Michigan Court of Appeals issued in this matter on 13 August, 2002. **(Exhibit 1)** Specifically, the plaintiffs/appellants contend this Court should grant the present application for leave to appeal as the Court of Appeals erred by failing to find that the plaintiffs/appellants were entitled to mediation sanctions pursuant to *MCR 2.403(O)* and disregarded prior published case law, the clear and unambiguous language of *MCR 2.403(O)*, and well-established principles of grammatical rules and statutory construction. In addition, by granting the present application for leave to appeal, this Court can clarify how assessable costs are to be calculated for purposes of determining whether mediation sanctions are warranted, thereby eliminating the uncertainty which would result if the Court of Appeals' decision was allowed to stand, a decision which conflicts with prior published case law.

2. Plaintiffs/appellants, William C. Dessart and Shiela A. Dessart, request the following relief:

- (a) An order granting leave to appeal the 13 August, 2002, opinion and order of the Michigan Court of Appeals;

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- (b) A final decision reversing the 13 August, 2002, opinion and order of the Court of Appeals and awarding the plaintiffs/appellants mediation sanctions to which they are entitled.

## Questions Presented For Review

1. Should this Court grant the present application for leave to appeal because the Court of Appeals erred by failing to following the unambiguous language contained in *MCR 2.403(O)*, as well as rules for statutory and grammatical construction?

Answer: The plaintiffs/appellants, William and Shiela Dessart, answer, “Yes,”  
The defendants/appellees answer, “No,”  
The Court of Appeals by its decision answers, “No.”

2. Should this Court grant the present application for leave to appeal because the Court of Appeals erred as a matter of law in failing to follow the prior published precedent of *Beach v State Farm Mutual Automobile Insurance Company*, 216 Mich App 612, 550 NW2d 580 (1996), *lv to appeal denied* 454 Mich 923, 564 NW2d 901 (1997), a decision which was ratified by this Court when it refused to grant the defendant’s application for leave to appeal, and *Grow v WA Thomas Co*, 236 Mich App 696, 601 NW2d 426 (1999), two cases which both properly construed the clear and unambiguous language of *MCR 2.403(O)* in support of the plaintiffs/appellants’ position?

Answer: The plaintiffs/appellants, William and Shiela Dessart, answer, “Yes,”  
The defendants/appellees answer, “No,”  
The Court of Appeals by its decision answers, “No.”

3. Should this Court grant the present application for leave to appeal and consider the issue presented concerning the proper time frame for calculating assessable costs for purposes of awarding mediation sanctions, as it involves a legal principle of major significance to the State's jurisprudence, presents an appeal from a decision of the Court of Appeals which was clearly erroneous and will cause material injustice, and conflicts with prior decisions of the Court of Appeals under *MCR 7.302(3)* and *(5)*?

Answer: The plaintiffs/appellants, William and Shiela Dessart, answer, "Yes,"  
The defendants/appellees answer, "No,"  
The Court of Appeals by its decision answers, "No."

4. Should this Court grant the present application for leave to appeal as the Court of Appeals erred in that its decision will not encourage settlement, but instead provides incentive for parties to reject mediation and proceed to trial?

Answer: The plaintiffs/appellants, William and Shiela Dessart, answer, "Yes,"  
The defendants/appellees answer, "No,"  
The Court of Appeals by its decision answers, "No."

5. Should this Court grant the present application for leave to appeal as the Court of Appeals erred when it failed to uphold that pursuant to the plain meaning and clear and unambiguous language of *MCR 2.403(O)(3)*, assessable costs include statutory taxable costs from

the date of filing a complaint through verdict, as well as interest from the date of filing a complaint through the date of mediation?

Answer: The plaintiffs/appellants, William and Shiela Dessart, answer, “Yes,”

The defendants/appellees answer, “No,”

The Court of Appeals by its decision answers, “No.”



## Standard Of Review

A trial court's decision to grant or deny a motion for mediation sanctions is subject to de novo review. *Cheron, Inc v Don Jones, Inc*, 244 Mich App 212, 218, 625 NW2d 93 (2000); *Meyer v Centerline*, 242 Mich App 560, 577, 619 NW2d 182 (2000). Interpretation of a court rule, like matters of statutory interpretation, presents a question of law that is reviewed de novo on appeal. *Marketos v American Employers Insurance Company*, 465 Mich 407, 413, 633 NW2d 371 (2001).

## Statement Of Material Proceedings And Facts

### A. Nature Of The Proceedings

This is a third party automobile negligence action. On 9 February, 1996, then forty-six year old William Dessart suffered life-changing injuries when the family car he was driving was sideswiped by defendant Lynn Burak's car after she lost control of her vehicle, crossed the centerline, and smashed into Mr. Dessart's driver's side door on U.S. 2/41 in Delta County, Michigan. The defendant was traveling at fifty to fifty-five miles per hour during a snow storm on slippery roads when she lost control and crashed into Mr. Dessart's vehicle. The collision left Mr. Dessart with a central disc protrusion at C6-7, sensory loss in his right C8 nerve distribution, and chronic and permanent neck, right shoulder, and right arm pain with associated physical overhead lifting and movement restrictions.

This matter came on for a jury trial on 30 August, 2000. The jury rendered a verdict in favor of the plaintiffs for past non-economic loss damages totaling \$100,000.00 (\$75,000.00 for plaintiff William Dessart and \$25,000.00 for plaintiff Shiela Dessart). Prior to trial, the parties were ordered to Michigan mediation pursuant to *MCR 2.403*. A mediation panel evaluated the case at \$120,000.00. The plaintiffs accepted the mediation evaluation award, while the defendants rejected the award. (A copy of the acceptance/rejection of the mediation evaluation is attached at **Exhibit 2**.) Following trial, a judgment was entered which was subsequently satisfied by the defendants in the amount of \$119,872.29. The judgment represented the \$100,000.00 jury verdict, as well as interest and taxable costs. The plaintiffs/appellants subsequently timely filed a

motion for mediation sanctions pursuant to *MCR 2.403* due to the defendants/appellees' rejection of the mediation evaluation in this case. After hearing oral argument and reviewing the respective briefs that were submitted, the trial court in this matter issued an order denying the plaintiffs' request for mediation sanctions. **(Exhibit 3)**

The dispute in this case arises as to what applicable time frame is utilized in determining the assessable costs for purposes of calculating the adjusted verdict under *MCR 2.403*. It is the plaintiffs/appellants' position assessable costs include statutory taxable costs from the date of filing the complaint through verdict. The defendants/appellees contend assessable costs include only those costs allowed by statute and incurred only from the date of filing the complaint through mediation. The trial court, disregarding what the plaintiffs/appellants believe is binding precedent, agreed with the defendants/appellees and ruled that assessable costs include only those taxable costs incurred from the date of filing the complaint through the mediation deadline. The plaintiffs/appellants timely appealed the trial court's decision denying their motion for mediation sanctions to the Michigan Court of Appeals.

It is undisputed that if assessable costs include all taxable costs from the date of filing the complaint through verdict, the plaintiffs are entitled to mediation sanctions as the adjusted verdict exceeds \$108,000.00. It is also undisputed that if assessable costs are permissible only from the date of filing the complaint through the mediation date, the adjusted verdict would not entitle the plaintiffs/appellants to mediation sanctions. Therefore, the sole question before this Court and addressed by the Court of Appeals is whether under *MCR 2.403(O)(3)* and the

applicable case law, in determining the adjusted verdict for mediation sanctions, do incurred assessable costs run from the date of filing the complaint through verdict as the plaintiffs/appellants contend, or through simply the date of mediation as the defendants/appellees contend.

The Court of Appeals, in its decision dated 13 August, 2002, agreed with the defendants/appellees interpretation of *MCR 2.403(O)(3)* and held that assessable costs are calculated from the date of filing to the mediation date for purposes of computing the adjusted verdict. **(Exhibit 1)** The plaintiffs/appellants contend the Court of Appeals erred by failing to follow the prior published appellate decision in *Beach v State Farm Mutual Automobile Insurance Company*, 216 Mich App 612, 550 NW2d 580 (1996), *lv to appeal denied* 454 Mich 923, 564 NW2d 901 (1997), in which this Court refused the defendants/appellees application for leave to appeal, and *Grow v WA Thomas Co*, 236 Mich App 696, 718-719, 601 NW2d 426 (1999), both cases which support plaintiffs/appellants' position.

In addition, the plaintiffs/appellants contend the clear and unambiguous language of *MCR 2.403(O)(3)*, when read in conjunction with long-established statutory construction and grammatical rules, supports the plaintiffs/appellants' position that the Court of Appeals erred as a matter of law. In addition, the Court of Appeals erroneously maintained that its decision would promote settlement, when in fact it will have the exact opposite effect as there will be less chance for mediation sanctions if taxable costs are assessed only through the date of mediation and not through verdict, thus discouraging settlement.

**B. Under The Clear And Unambiguous Language Of *MCR 2.403(O)(3)*, As Well As Prior Published Case Law, The Defendants/Appellees Failed To Obtain A More Favorable Adjusted Verdict And Thus Must Pay Mediation Sanctions**

The mediation evaluation totaled \$120,000.00. The plaintiffs accepted while the defendants rejected mediation. For the defendants to escape paying mediation sanctions, the “adjusted verdict,” as that term is defined in *MCR 2.403(O)*, must be \$108,000.00 or less.

In pertinent part, *MCR 2.403(O)*, states:

**(O) Rejecting Party's Liability for Costs.**

(1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the mediation evaluation.

(2) For the purpose of this rule "verdict" includes,

- (a) a jury verdict,
- (b) a judgment by the court after a nonjury trial,
- (c) a judgment entered as a result of a ruling on a motion after rejection of the mediation evaluation.

(3) **For the purpose of subrule (O)(1), a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the mediation evaluation, and, if applicable, by making the adjustment of future damages as provided by MCL 600.6306; MSA 27A.6306. After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the**

evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant. [Emphasis added.]

Past damages, and interest from the date of filing the complaint through mediation, total \$105,491.93. To this figure must be added “assessable costs.” The present dispute between the plaintiffs/appellants and the defendants/appellees will be as to what constitutes assessable costs under *MCR 2.403(O)(3)*. Assessable costs, according to the defendants/appellees and the Court of Appeals, include only those costs allowed by statute and incurred only from the date of filing the complaint through mediation. The plaintiffs contend assessable costs are broader and include statutory taxable costs from the date of filing through verdict, plus a reasonable attorney fee from the date of mediation through verdict necessitated by the defendants’ rejection of the mediation evaluation.

*MCR 2.403* provides that for purposes of the entire rule, actual costs include “those costs taxable in any civil action” and “a reasonable attorney fee based on reasonable hourly or daily rates as determined by the trial judge for services necessitated by the rejection of the mediation evaluation.” Therefore, assessable costs when calculating the adjusted verdict must necessarily include not only statutory taxable costs allowed in any civil action from filing to verdict but also a reasonable attorney fee necessitated by rejection of the mediation evaluation.

The plaintiffs/appellants’ version of how *MCR 2.403* must be applied is supported by *Beach v State Farm Mutual Automobile Ins Co*, 216 Mich App 612, 550 NW2d 580, lv denied 454 Mich

923, 564 NW2d 901 (1997). In *Beach*, the defendant was assessed mediation sanctions that it challenged on appeal. First, the court analyzed what, if any, of the plaintiff's costs were properly included. After finding that some of the costs were improperly included, the court vacated the mediation award and then instructed the trial court to recalculate the verdict to determine whether it was more favorable to the rejecting defendant. In explaining how the trial court should go about calculating the adjusted verdict, the appellate court explained:

The mediation panel unanimously awarded \$17,573.75 in plaintiff's favor on October 14, 1993. Assuming that plaintiff raised the same issues at mediation and at trial, **the court should add to the \$17,500 jury verdict all assessable costs, including costs taxable in a civil action and a reasonable attorney fee incurred from the date of mediation**, as well as any interest on the verdict amount from the date the complaint was filed to the date of the mediation evaluation, in order to determine whether plaintiff improved his position at trial by more than ten percent, i.e., plaintiff received more than \$19,333.12. *MCR 2.403(O)(3)(6)*. If so, plaintiff is entitled to his actual costs, including attorney fees, pursuant to *MCR 2.403(O)*. [Emphasis added.] *Beach v State Farm Mutual Automobile Ins Co*, *supra*, at 216 Mich App 614.

In adhering to the *Beach* interpretation of *MCR 2.403(O)*, and without even considering whether attorney fees are included in calculating if mediation sanctions are appropriate, it is undisputed the adjusted verdict would exceed \$108,000.00 if all assessable costs are calculated through verdict, entitling the plaintiffs/appellants to mediation sanctions. Therefore, when properly applying the requirements of *MCR 2.403(O)* consistent with *Beach*, the adjusted verdict was not more favorable to the defendants, and therefore sanctions must be assessed.

It is important to note that this Court denied the defendant/appellee's application for leave in *Beach*. Thus, it can only be presumed this Court did not see the need to either disrupt or overturn the appellate's court interpretation and reading of the mediation sanction rule. In addition, the *Beach* court's reading of the statute and interpretation regarding assessable costs has been recently ratified and approved by the appellate court, albeit by dicta, in the case of *Grow v WA Thomas and Company*, 36 Mich App 696, 601 NW2d 426 (1999). In *Grow*, the defendant made the identical argument of the present defendants/appellees contending the adjusted verdict included assessable costs only between the period of filing the complaint to the date of the mediation evaluation. The *Grow* appellate court rejected this argument and stated:

In light of our holding, we find moot defendant's alternative argument that, pursuant to *MCR 2.403(O)(3)*, the "adjusted verdict" was more favorable to defendants than the mediation evaluation. We note briefly, however, that the trial court properly interpreted this subrule, and added to the verdict all assessable costs, including attorney fees, rather than only those costs for the period between the filing of the complaint and the date of the mediation evaluation. See *Dale v Beta-C, Inc*, 227 Mich App 57, 69, 574 NW2d 697 (1997) ("**[I]t is a general rule of statutory, as well as grammatical, construction that a modifying clause is confined to the last antecedent unless a contrary intention appears.**"). [Emphasis added.]

Thus, the plaintiffs/appellants' position is supported not only by the clear language of the court rule, general rules of statutory and grammatical construction, but by the cases of *Beach* and *Grow, supra*. Nonetheless, the trial court and Court of Appeals inexplicably ruled in favor of the defendants/appellees in denying the plaintiffs/appellants' motion for mediation sanctions to which they were rightfully entitled. The plaintiffs/appellants request that this Court grant the



present application for leave to appeal, reverse the erroneous Court of Appeals' decision, and find that the plaintiffs/appellants are entitled to collect mediation sanctions pursuant to *MCR 2.403(O)(3)* as the adjusted verdict was not more favorable to the defendants/appellees when properly calculated.

### **Relief Requested**

For the forgoing reasons, the plaintiffs/appellants William C. Dessart and Shiela A. Dessart request that this Court grant the present application for leave to appeal as the Court of Appeals erred in failing to follow the clear language of *MCR 2.403(O)(3)* and prior published precedent.

In addition, the plaintiffs/appellants request that this Court reverse the Court of Appeals' decision and find that the plaintiffs/appellants are entitled to mediation sanctions pursuant to *MCR 2.403(O)(3)*.

Dated: August 28, 2002

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